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JAMES D. MAHER,
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1920

SILVER KING COALITION MINES
COMPANY, a Corporation,

Appellant

vs.

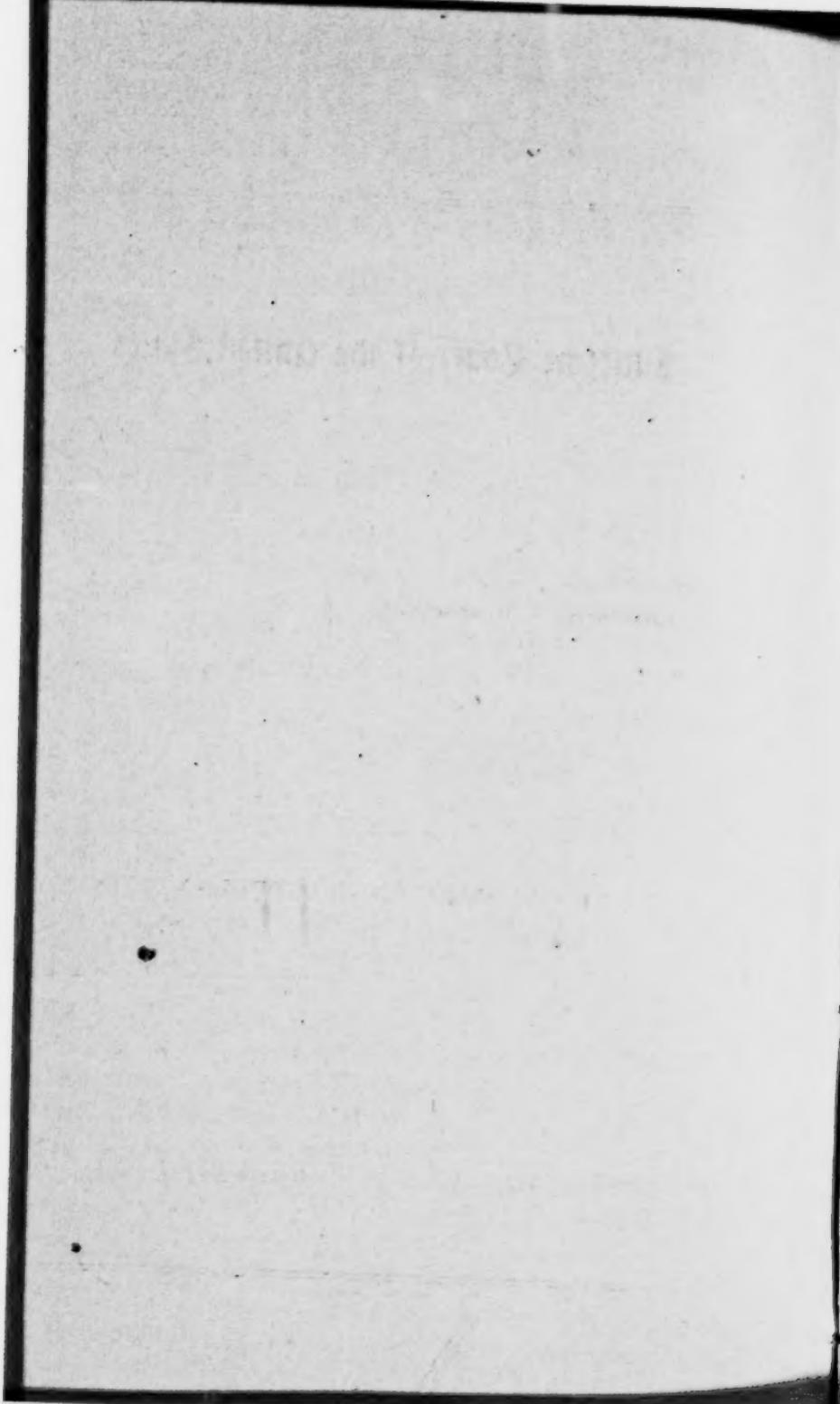
CONKLING MINING COMPANY,
a Corporation,

Appellee

No. 187.

BRIEF ON BEHALF OF APPELLANT IN
OPPOSITION TO MOTION TO DISMISS

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COMPANY, *a Corporation,*
Appellee,
vs.
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Appellant.

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In the petition for allowance of appeal submitted to the Justice of the Court below who allowed the appeal, it was set forth that a petition for *certiorari* had been prepared and presented for submission to this Honorable Court and that thereafter counsel for the petitioner had held many consultations and conferences relative to the question whether or not the cause was one as to which the United States Circuit Court of Appeals had final jurisdiction and, therefore, whether or not it was a

proper case to be reviewed by this Honorable Court on appeal, and that such question was an open and doubtful one and that the petitioner's counsel were in doubt respecting the same, but that it was a question which would have to be passed upon by this Honorable Court on the application for *certiorari* and if this Honorable Court should deny the application therefor upon the ground that the case was one in which the Circuit Court of Appeals had not final jurisdiction and was a proper case to be reviewed by this Honorable Court on appeal, then, unless the appeal were allowed, a grave and manifest injustice would be done the petitioner, and that if the petitioner should be allowed an appeal the respondent could suffer no injury and no substantial inconvenience as the question of the availability of the appeal could be disposed of upon a motion to dismiss or affirm, and thereby the petitioner would be afforded the justice of having its application for the writ of *certiorari* disposed of on the merits and not on a technicality as to procedure.

This Honorable Court granted the petition for writ of *certiorari*, and that case, No. 158, this Term, will probably be reached for argument at an early day, and it has been stipulated that the record in only one of the cases be printed and the cases on appeal and *certiorari* be heard together on the same record.

Whether this Honorable Court will dispose of this controversy in the *certiorari* case depends upon its decision of the question presented by the pending motion, which depends upon whether in the amended bill (Vicksburg vs. Henson, 231 U. S. 259) the plaintiff set up grounds of relief based upon Federal statutes which were necessary elements of the decision of the Circuit Court of Appeals (Henningsen vs. U. S. F. & G. Co., 208 U. S. 404).

We submit that, under the circumstances, considera-

tion of the pending motion should be postponed until the hearing on the merits and that the cases on appeal and on *certiorari* should be heard together. We, therefore, here merely point out the allegations of the amended bill which seem to present a ground for relief involving a Federal statute.

As construed by the court below, the bill of complaint was one to quiet title to three-fourths interest in the 135 feet strip in controversy as part of the patented Conkling claim, to which 135 feet strip, as part of the patented Custer No. 2 and Silver Hill No. 4 mining claims, the defendant was setting up claim of exclusive title.

The bill also proceeded upon the alternative ground that the defendant in its purchase of the Custer No. 2 and the Silver Hill No. 4 claims was responsible as trustee for the plaintiff to the extent of three-fourths interest. That alternative aspect of the case, however, was ignored by the courts below.

In paragraph V the amended bill set up a portion of the description contained in the Conkling patent, dated February 23, 1892, whereby it appeared that the boundaries of the claim were set forth as beginning at corner No. 1, a pine post, marked, thence by course and distance to corner No. 2, a pine post, marked, common to the Conkling and two other claims, with ties to a U. S. mineral monument and a pine tree, thence by course and distance to corner No. 3 (without mention of a monument at that point), thence by course and distance to corner No. 4 (without mention of a monument at that point), and thence by course and distance to the beginning.

In paragraph X it was alleged that the defendant asserted exclusive interest, and not as tenant in common,

in the 135 feet strip, because of its alleged ownership of the Custer No. 2 and Silver Hill No. 4 mining claims, and also because it asserted that the boundaries of the Conkling claim as described in the patent thereof and in paragraph V, were not the proper boundaries thereof to the extent of including said strip, and that the defendant ought not to be permitted to controvert and vary the location and boundary of the Conkling claim upon the ground as the same are described in the patent, and that by the description contained in the patent the location of the boundaries of the Conkling claim could be readily traced, ascertained and determined upon the ground.

In paragraph XIV it was alleged that the Custer No. 2 and Silver Hill No. 4 mining claims were patented June 2, 1904, upon location notices antedating the location of the Conkling claim, and that, as patented, the Custer No. 2 and Silver Hill No. 4 overlapped and included a large area of the Conkling claim as described in the Conkling patent and in paragraph V, including within such overlap the 135 feet strip in controversy.

In paragraph XVIII it was alleged that the survey of the Conkling claim purported to have been made in November, 1889, by Adolph Jessen, now deceased, then Deputy U. S. Mineral Surveyor, that all other persons connected with the making of said survey were either dead or their whereabouts unknown, that said claim was situated in a rough country, at a high altitude, that the surface was covered in part with large trees and thickets of brush and undergrowth, that the snowfall in the winter was very great, that none of the original marks and boundaries of the Conkling claim referred to in the patent were standing and that the original place where the respective corners were marked, if marked at all, was only a matter of speculation; and that by reason of the secret

acts of the defendant and its predecessors in title the plaintiff was left entirely helpless in the premises to meet the contentions made by the defendant in reference to the boundaries of the Conkling claim being other than as described in said patent and in paragraph V.

The second prayer of the amended bill was that the claim of adverse title set up by the defendant be declared null and void and the title of the plaintiff to three-fourths interest in the Conkling claim, embracing the 135 feet strip in controversy, be established and confirmed as against any and all claims of the defendant and all cloud thereon be forever removed.

It will have been observed that the amended bill concedes that the 135 feet strip in controversy was embraced in the Custer No. 2 and Silver Hill No. 4 claims as patented, but sets up claim to that strip as part of the Conkling claim (junior location but senior patent) as patented.

The question now is whether such contention is made by the amended bill in such form or manner as to present a case arising under the Federal Mining Law., Hopkins vs. Walker, 244 U. S. 486.

The Circuit Court of Appeals seems to have regarded the amended bill as presenting the contention in its broadest aspect, viz., that the courses and distances (omitting mention of corner monuments) in the description in the Conkling patent were controlling to fix the *locus* of that claim and preclude inquiry into the actual positions of corners 3 and 4 as fixed and monumented in the official survey, and to have sustained the suit on that theory.

In the light of the peculiar procedure prescribed by the Federal Mining Law whereby a mining claim is first to be officially surveyed and monumented and thereby segregated as a numbered lot or subdivision in the system of

public-land surveys, and posting and publication of notice of application for patent for that so segregated lot are required as precedent conditions of, and limitations upon, jurisdiction or power of the Land Department in the premises to allow purchase and entry by the applicant and to convey by patent to him, it would seem that the question presented by such contention necessitates inquiry into the Federal Mining Law to determine, in the first place, the nature, function, operation and effect of mineral patent, and, in the next place, the nature and extent of, or limitations upon, the power of the Land Department in allowing purchase and entry of mining claim and issuing patent therefor.

These subjects are fully presented in the briefs filed in support of the application for the writ of *certiorari* and will be fully argued at the final hearing.

The case presented would seem in principle to be analogous to *Hopkins vs. Walker, supra*.

Respectfully submitted,

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